judgment

THE HAGUE DISTRICT COURT

Commerce Team

case number / cause-list number: C/09/596260 / KG ZA 20-670

Judgment in preliminary relief proceedings of 15 May 2020

in the case of

the company incorporated under foreign law
RUSSIAN STATE ENTERPRISE FKP SOJUZPLODOIMPORT, with its registered office in Moscow, Russian Federation,
claimant,
counsel: J.C.H. van Manen,

versus:

1. the company incorporated under foreign law
HULLEY ENTERPRISES LIMITED, with its registered office in Nicosia, Cyprus,

2. the company incorporated under foreign law
VETERON PETROLEUM LIMITED, with its registered office in Nicosia, Cyprus,

3. the company incorporated under foreign law
YUKOS UNIVERSAL LIMITED, with its registered office in Douglas, Isle of Man,
defendants,
counsel: T.L. Claassens,

4. the company incorporated under foreign law
RUSSIAN FEDERATION, seated in Moscow, Russian Federation,
defendant,
counsel: R.S. Meijer

Claimant will hereinafter be referred to as FKP. Defendants will be referred to separately as Hulley, Veteron, Yukos and the Russian Federation. Defendants 1 to 3 will be collectively referred to as HVY (plural).

The case is being handled by J.C.H. van Manen, L.E. Fresco, E. Meyer and R.J.F. Grijpink, lawyers practising in Amsterdam (FKP), T.L. Claassens, M. Boevink and E. Slabbers (HVY) and R.S. Meijer, R. Verkerk and A. Gonzalez (Russian Federation).

1. The proceedings

1.1. The course of the proceedings is reflected by:
- the summons dated 24 July 2020, with Exhibits EP01 to EP09;
- the statement of defence of HVY dated 22 September 2020, with Exhibits GP01 to GP51;
- the submission of additional exhibits, also increase or specification of claim of FKP dated 13 October 2020, with Exhibits EP 10 to EP13;
- the submission of exhibits of the Russian Federation dated 13 October 2020, with Exhibits GP(RF)01 to GP(RF)03;

- the submission of additional exhibits of HVY dated 13 October 2020, with Exhibits GP52 to GP61.

1.2. On 13 October 2020, the oral hearing of the preliminary relief proceedings was held, during which the parties presented their views on the basis of the written arguments submitted by them. The remainder of the proceedings at the hearing were noted by the Registrar and are in the court file.

1.3. Finally, a judgment was rendered.

2. The facts

2.1. FKP is a state enterprise whose activities include the exploitation of brands relating to Russian vodka and other products of Russian origin.

2.2. Hulley, Veteron and Yukos are three former shareholders of the Russian company OJSC Yukos Oil Company ("Yukos Oil Company"), which has been liquidated.

2.3. On 7 May 2020, HVY levied executory attachment against (A) the Russian Federation and (B) FKP on:
Benelux trademark rights vested in the Russian Federation but held by FKP Soyuzplodoimport or registered in the name of FKP Soyuzplodoimport, including (...) "

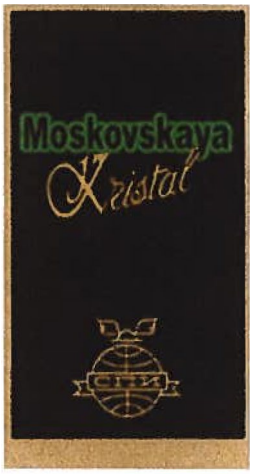
The enumeration below lists the following trademarks registered in the name of FKP for class 32 and/or 33:

(i) the Benelux word mark MOSKOVSKAYA with registration number 0726228;

(ii) the Benelux figurative mark with registration number 0731953;

(iii) the Benelux figurative mark with registration number 0318390;

(iv) the figurative mark with international (WO) registration number 0827728 only insofar as this figurative mark designates the Benelux;



(v) the Benelux word mark STOLICHNAYA with registration number 0728245;

(vi) the Benelux figurative mark with registration number 0318391;

(vii) the Benelux figurative mark with registration number 0731954;

(viii) the Benelux figurative mark with registration number 0977467;

(ix) the Benelux figurative mark with registration number 0977468;

(x) the figurative mark with international (WO) registration number 0828377 only insofar as this figurative mark designates the Benelux;

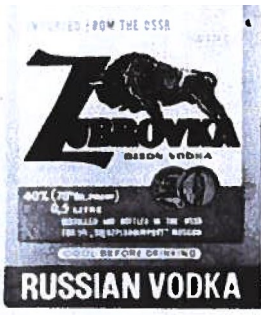
(xi) the Benelux word mark NA ZDOROVYE with registration number 0340220;

(xii) the Benelux figurative mark with registration number 0340232;

НА ЗДОРОВЬЕ

(xiii) the word mark SOVETSKOE with international (WO) registration number 0834602 only in so far as this word mark designates the Benelux;

(xiv) the figurative mark ZUBROVKA RUSSIAN VODKA with international (WO) registration number 0562217 only in so far as this figurative mark designates the Benelux;



(xv) the Benelux figurative mark CNH with registration number 0982642;

(xvi) the figurative mark KUBANSKAYA RUSSIAN VODKA with international (WO) registration number 0915515 only in so far as this figurative mark designates the Benelux;

(xvii) the figurative mark OKHOTNICHYA, with international (WO) registration number 0921554, only insofar as this figurative mark designates the Benelux;

(xviii) the word mark SOVIET with international (WO) registration number 0846479 only in so far as this word mark designates the Benelux;

These marks will hereinafter collectively be referred to as "the trademarks".

2.4. The attachment has also been levied on:

“all rights under the 1912 Copyright Act accruing to the Russian Federation relating to any of the pictorial elements of any of the aforesaid Trademarks, including in particular the trademarks appearing on the labels of the Stolichnaya and Moskovskaya vodka, and all rights under the 1912 Copyright Act to the design of the products produced and sold under the Trademarks by or with the consent of FKP Soyuzplodoimport and/or the Russian Federation."

2.5. The attachment report contains - where relevant - the following notice:

"that the execution creditors take the view that the rights hereby attached accrue to the Russian Federation, as also follows from the ruling of The Hague Court of Appeal of 24 July 2012 in the case with case number 105.005,107/02 (ECLI:NL:GHSGR:2012:BX1515), and that FKP Soyuzplodoimport - insofar as it is the holder of such rights - is exclusively the administrator of such state property for the benefit of the Russian Federation. Notwithstanding this position, in order to comply with the legal provisions protecting the possible rights of "third parties", notice/service of this attachment is/will be given to/made on FKP Soyuzplodoimport;

that the execution creditors take the view that, by their nature, the attached copyright and trademark rights are not being used or intended for public purposes. The nature and character of those rights, including the indication of class and indication of goods and services, which relate to alcoholic beverages, including vodka, implies that they are intended for exclusively commercial purposes. ”

2.6. The public auction of the attached trademarks and associated copyrights was initially announced for 24 September 2020. Following postponement until 21 October 2020, HVY

have again postponed the public auction. They are awaiting the outcome of the motion for suspension in the setting aside proceedings (see below).

the arbitral awards

2.7. The executory attachment serves to enforce three arbitral awards rendered by the Permanent Court of Arbitration in The Hague on 18 July 2014 (hereinafter: the arbitral awards). On 28 April 2020, The Hague District Court in preliminary relief proceedings granted leave to enforce the arbitral awards, which was served on the Russian Federation on 4 May 2020, with the request to comply with the arbitral awards. Pursuant to those awards, the Russian Federation owes HVY the following amounts, according to the attachment report:

Hulley (PCA Case No. AA 226) principal	USD 39,971,834,360
arbitration costs EUR 3,388,197	
lawyers' fees	USD 47,946,190
interest	pm
Veteron (PCA Case No. AA 228)	
principal	USD 8,203,032,751
arbitration costs	EUR 695,327
lawyers' fees	USD 9,839,533
interest	pm
Yukos (PCA Case No. AA 227)	
principal	USD 1,846,000,687
arbitration costs	EUR 156,476
lawyers' fees	USD 2,214,277
interest	pm

the setting aside proceedings

2.8. The Russian Federation summoned HVY to appear before The Hague District Court on 10 November 2014 and claimed the setting aside of the arbitral awards. Those claims were awarded by the District Court[1]. HVY appealed against that judgment. On 18 February 2020, The Hague Court of Appeal delivered its ruling, setting aside the judgment of the District Court and dismissed the claims of the Russian Federation[2]. On 15 May 2020, the Russian Federation lodged an appeal in cassation against that ruling and, on 23 June 2020, lodged a motion pursuant to Article 1066 Dutch Code of Civil Procedure to suspend enforcement of the arbitral awards. The Supreme Court accepted jurisdiction to hear the motion[3]. The motion for suspension is still pending.

the trademarks

2.9. Some of the trademarks were registered in the 1970s by a state enterprise of the Union of Soviet Socialist Republics ("USSR") called 'VO Sojuzplodoimport' and, following a change of

[1] The Hague District Court 20 April 2016, ECLI:NL:RBDHA:2016:4229.
[2] The Hague Court of Appeal 18 February 2020, ECLI:NL:GHDHA:2020:234
[3] Supreme Court 25 September 2020, ECLI:NL:HR:2020:1511.

legal form in 1990, by 'VO VO Sojuzplodoimport' ('VO/VVO'). The other trademarks were registered by FKP.

the Rotterdam proceedings

2.10. In 2006, the trademarks originally registered by VO/VVO were registered in the name of Spirits International N.V. ("Spirits"). From 2006 to 2020, proceedings were brought in the Netherlands on the question of whether Spirits is the holder of a number of the trademarks attached, in proceedings commenced before the Rotterdam District Court ("Rotterdam proceedings")[4]. Spirits was ordered by final judgment of the Rotterdam District Court of 25 March 2015, upheld on appeal and in cassation, to register the trademarks registered by VO/VVO in the name of FKP. Those trademarks have been registered in the name of FKP since 7 July 2015.

2.11. In the Rotterdam proceedings, Spirits contested, inter alia, FKP's right of action. In its ruling of 24 July 2012[5], the Court of Appeal considered that FKP was both the substantive and formal party to the proceedings and, in so far as relevant, considered the following:

"7.*13 FKP stated that the legal form of VFO had been changed to FGUP by Decree No 192 of 22 February 2001 of the Ministry of Agriculture of the Russian Federation, whereby the name of VVO was changed to 'FGUP VO Soyuzplodoimport'. (...) It must therefore be assumed that VVO was renamed FGUP in 2001; (...)*

7.14 FKP stated that the Russian State subsequently, at FGUP's request, took back the trademark rights held by FGUP (including the VO trademark rights) in order to transfer them to another state enterprise. Spirits disputed that: in its view, under Russian law, the Russian State could not take back the trademark rights. The Court of Appeal does not follow Spirits in that view. However, under Russian law, the Russian State could take back the trademark rights, including those of an FGUP-type state enterprise, on the basis of the authority it has to do so as owner of the state enterprise and its assets (...).

7.*15 FKP stated that in 2002 the Russian State then (finally) transferred the trademark rights in question to FKP: the trademark registrations in the Russian Federation were entered in the name of FKP, while with respect to the foreign trademark registrations, FKP was authorised to initiate proceedings to recover them in its own name, as is also apparent from its charter. In the opinion of the Court of Appeal, Spirits did not dispute this (at least not in a sufficiently substantiated manner). The decrees of a later date to which Spirits refers (stating that FKP has been entrusted 'to represent the interests of the Russian Federation in courts on questions of restoration and protection of the rights of the Russian Federation to the trademarks on alcoholic products abroad')' are without prejudice to the foregoing. As a state enterprise, FKP also represents the interests of the Russian Federation (...) where it acts in its own name in these proceedings.*

[4] Rotterdam District Court 14 June 2006, ECLI:NL:RBROT:2006:AX8566, The Hague Court of Appeal 24 July 2012, ECLI:NL:GHSGR:2012:BX1515, Supreme Court 20 December 2013, ECLI:NL:HR:2013:2071, Rotterdam District Court 25 March 2015, ECLI:NL:RBROT:2015:2044, The Hague Court of Appeal 9 January 2018, ECLI:NL:GHDHA:218:13, Supreme Court 24 January 2020, ECLI:NL:HR:2020:l 12

[5] ECLI:NL:GHSGR:2012:BX1515.

7.16 In all this, the Court of Appeal notes that this was in fact a real location of (the management of) state property of the Russian Federation. In addition, the Court of Appeal notes that, contrary to Spirits' arguments, trademark rights under Russian law can indeed be state property (...).

7.17 It appears from the foregoing that (...) FKP has a right of action. Cross-appeal 2 therefore succeeds. As a result, the judgment in the original action will be set aside to the extent that the case is referred to the cause list so that FKP can submit a statement as referred to in grounds 3.9 and 3.56.

7.18 Insofar as Spirits (also) intended to argue that FKP does not have the authority to take legal action ('ius standi in iudicio'), the Court of Appeal considers as follows. The question of whether FKP has this authority must, according to Dutch private international law, be answered on the basis of the law of the Russian Federation (...). Under Russian law this question must be answered in the affirmative, as also appears from the opinion of Professor Feldbrugge (...). FKP is, as Spirits has not disputed, a ('federal treasury company'), a state enterprise of the Russian Federation which has state property in operational management (...), as can be seen from FKP's charter (...). Such an entity has the authority to take legal action (...). This is also laid down in the charter of FKP (...). FKP has acquired this authority as of 9 April 2002, the day of state registration of FKP (...). FKP is therefore an entity authorised to take legal action, also in these proceedings, which were initiated on 21 February 2003.

7.19 In so far as Spirits also wished to raise the question of whom FKP is acting for in the present proceedings, the Court of Appeal considers as follows. FKP's assertions are that the VO trademark rights have always remained State property (of, in succession, the USSR, the RSFSR and the Russian Federation) and that the management of that State property has accrued to successive State undertakings (VO, VVO, FGUP, and now FKP). Today that is FKP, (...). According to FKP, this has been confirmed by the Russian Federation, inter alia in Decree No. 6 of 6 January 2005 (...), in the letter of 9 June 2007 (...), and in Decree No. 1189 of 29 December 2010 (...). In short, the VO trademark rights are state property of the Russian Federation, which is managed by FKP; FKP therefore has the exclusive right, in its own name, to use, exploit, register and enforce in law these trademarks. In these proceedings, FKP is upholding its own rights and in so doing is also automatically representing the interests of the Russian Federation, according to FKP. Taken together, FKP therefore states that it is acting pro se and thus - as a state enterprise - also on behalf of the Russian Federation. This is also evident from the originating summons. Consequently, in the present proceedings, FKP is to be regarded as a party to the formal and substantive proceedings.

amendment to the RCC in 2014[6]

2.12. Act No 35-FZ of 12 March 2014 introduced Article 1127(3) RCC, which applies from 1 October 2014:

"The provisions of Section II of the present Civil Code shall not apply to intellectual rights, unless otherwise provided by the rules of the present section."

Section II of the RCC regulates *'The Right of Ownership and the Other Rights of Estate'*

[6] Russian Civil Code

the 2015 agreement

2.13. On 15 May 2015, an agreement was concluded between the Russian Federation, on the one hand, and FKP, on the other hand, by which all rights to (inter alia) the trademarks were transferred to FKP to the extent necessary (hereinafter: the 2015 agreement). The preamble to the 2015 Agreement reads, among other things:

"WHEREAS, under its Charter approved by Order of the Government of the Russian Federation dated March 11, 2002 no. 286-r and the corresponding decrees of the Government of the Russian Federation, Party 2 has exercised the right to use and dispose of the trademarks of alcohol and alcohol-containing products abroad, register those trademarks in its own name and bring suit to reclaim those trademarks, cease infringements on those trademarks, recover damage suffered and any other claims related to the trademarks,

WHEREAS, starting from October I, 2014 the provisions of Federal Law No. 35-FZ dated March 12, 2014 'On Introduction of Amendments to the First, the Second and the Fourth Parts of the Civil Code of the Russian Federation and Certain Legislative Acts of the Russian Federation' came into force providing for inter alia non-application of provisions of the Civil Code of the Russian Federation governing rights in rem to intellectual property,

WHEREAS, under Decree of the Government of the Russian Federation No. 117 dated February 12, 2015 'On Transfer of Exclusive Rights to Trademarks of Alcohol and Alcohol-Containing Products to Federal Treasury Enterprise 'Sojuzplodoimport', Party I was instructed to enter with Party 2 into an agreement on transfer (alienation) of exclusive rights to the trademarks of alcohol and alcohol- containing products as well as the rights to reclaim, recognize them and claim to recover damage and compensation that arose before the transfer of the rights to these trademarks."

2.14. In so far as is relevant, Article 1 of the 2015 agreement reads: "1. "Party 1" transfers its entire exclusive and other rights to the assigned property to the extent such assigned property would not already lie with "Party 2", to "Party 2", and "Party 2" accepts this property which includes:

1.1. all rights to the trademarks originally registered in the name of the All-Union Association for import and export of food and agricultural products of vegetable origin "Sojuzplodoimport" and/or its legal successors anywhere in the world, except in the Russian Federation and in the United States of America, including but not limited to (...) Benelux, as well as international registrations of the trademarks for which the basic registrations were Russian (Soviet) trademarks registered earlier in the name of All-Union Association for import and export of food and agricultural products of vegetable origin "Sojuzplodoimport" and/or its legal successors including the following verbal elements both in Cyrillic and Latin (hereinafter the "Trademarks"):

- *Stolichnaya*
- *Moskovskaya*
- *SP1*
- *(...)*
- *Kubanskaya*
- *(...)*
- *Zubrovka*
- *(...)*
- *Kristal*
- *(...)*
- *Na Zdorovye*

- *Okhotnichya*

(...)

1.3. all other intellectual property rights relating to the Trademarks held by "Party 1 ", including but not limited to copyrights, advertisements, trade dress, trade names and domain names,"

2.15. Insofar as relevant, Article 2 of the 2015 agreement reads:

"2. *The Parties confirm that since its incorporation, "Party 2" had the rights to (i) use and dispose of the Assigned Property, (ii) register the Trademarks in its own name and (iii) bring suit to claim back any Assigned Property, cease infringements on the Assigned Property, recover for damages and compensation for infringement of the rights to the Assigned Property (...)"*

3. The dispute

3.1. FKP claims - in summary - that the Court in preliminary relief proceedings:

A) by provisional (oral) judgment, to be given at the end of the oral hearing, suspend the execution of the attachment levied by HVY until the claims set out below have been decided by judgment;

and furthermore: principally:

B) by provisionally enforceable judgment to lift the attachment made by HVY;

alternatively:

C) by provisionally enforceable judgment to suspend the execution of the attachment levied by HVY until (i) the proceedings between HVY and the RF have resulted in a final and binding decision, whereby the arbitral awards are upheld, and (ii) it has been established in the main action between HVY and FKP that HVY can recover from the trademarks of FKP;

principally as well as in the alternative:

D) to order HVY to pay the costs of these proceedings[7].

3.2. To this end FKP states the following.

(i) The attachment is unlawful, since FKP - both in the situation of operational management and after the 2015 agreement - is the full and exclusive holder of the IP rights, against which creditors of the Russian Federation cannot seek recovery.
(ii) FKP invokes immunity from execution.
(iii) Insofar as the attachment is not lifted, a weighing of interests should lead to suspension of execution.

3.3. HVY have presented a substantiated defence and the Russian Federation endorses FKP's claims.

[7] In the summons, FKP claims a costs award under Article 1019h Dutch Code of Civil Procedure. During the oral hearing, FKP indicated to claim the regular legal costs.

3.4. Where relevant, the positions of the parties will be discussed below.

4. The assessment

4.1. In advance, this Court considered the following. The parties agree that the points of dispute in this case are partly governed by Dutch law and partly by Russian law. The requirements of a due process order do not oppose the application of Russian law in these preliminary relief proceedings. This Court must apply Russian law ex officio, as much as possible in the way this is done in the Russian Federation. It is not for the Dutch court to usher in an entirely new legal development in a foreign legal system. Due to its urgent and provisional nature, the parties in preliminary relief proceedings may be required to play a more active role in finding out the content of foreign law. This broader obligation on the parties to provide information does not mean that this Court, in its final judgment on foreign law, is not bound by the parties' submissions on the matter.

4,2. The parties have informed this Court, in their submissions and opinions, of what they consider to be the relevant content of Russian law. FKP has submitted an opinion by Alexander Muranov[8]. It also submitted opinions from the Rotterdam proceedings, by I.A. Zenin[9] and O.I. Skvortsov[10]. HVY submitted an opinion by Eugenia Kurzynsky-Singer[11]. The parties submitted English translations of relevant legal texts and Russian case law. The English translations of Russian legal provisions cited below are the translations submitted by the parties. Furthermore, the Russian Federation submitted, inter alia, French judgments (in the French language) involving the application of Article 126(1) RCC.[12] In order to carry out its task of determining the content of foreign law of its own motion, this Court has carried out some investigations of its own into the content of the relevant Russian law.

4.3. This Court disregards the observations of HVY on the alleged involvement of the office of FKP's expert, Muranov, in the manipulation of Dutch and Armenian judges, solely on the ground that it does not follow from anything that Muranov himself was involved in any way. Nor does the alleged manipulation say anything about Muranov's expertise in Russian law. The same applies to the assistance allegedly provided by Muranov to a 'shady' client, according to HVY. This Court also disregards HVY's comment that Muranov, who was previously engaged by FKP as an expert on Russian law, was found to be wanting in proceedings before the US District Court in New York because the US District Court considered that "Mr Muranov's Argument Lacks Sufficient Support" because "while persuasive at first blush, lacks sufficient support in Russian case law and the Civil Code". This is common with positions taken in legal proceedings. So, this is no reason to dismiss Muranov's opinion as unreliable or to give it less weight in advance, as HVY apparently aim to do with their comments on Muranov. This Court does not attribute more or less value to one or other of the opinions at issue. All the opinions submitted are reports by party-appointed experts.

Dutch law applicable to the question as to under which conditions the attachment may be lifted

[8] EP10.
[9] EP 13 A.
[10] EP13B.
[11] GP42.
[12] GP(RF)3B to 3F.

4.4. Dutch law as *lex fori* applies to the way in which proceedings are conducted before the Dutch courts, pursuant to Article 10:3 DCC[13]. The question as to under which conditions preliminary relief may be applied for is a question of procedural law. Articles 254 and 438 DCCP[14] therefore govern the question as to under which conditions the attachment may be lifted.

4.5. This Court finds that FKP has an urgent interest in the relief sought. The fact that HVY postponed the intended execution auction until after the decision of the Supreme Court in the pending motion for suspension in the setting aside proceedings does not change that.

4.6. The purpose of the attachment is to enforce the arbitral awards against the Russian Federation. In view of the pending setting aside proceedings, this Court assumes that the Russian Federation must comply with the arbitral awards.

4.7. The exequatur only grants HVY leave to enforce the arbitral awards against the Russian Federation. It follows from the notification that the attachment has been levied on the basis of the situation indicated by the Court of Appeal in the Rotterdam proceedings in which FKP, as a Russian state enterprise, carries out the operational management of IP rights.

4.8. Although the notification mentions that attachment has been levied on 'rights under the 1912 Copyright Act' of the pictorial elements of the trademarks held by the Russian Federation, it is unclear which copyright-protected works HVY have in mind. This Court finds that only the trademarks are subject to attachment.

The situation of Russian state ownership in operational management taken as a starting point by HVY

4.9. The attachment is levied on the basis of the view (a) that the trademarks belong to the Russian Federation and (b) that FKP - insofar as it is the holder of the trademarks - is only the operational manager of state property for the benefit of the Russian Federation. The principal claim is based on the assertion that the attachment was unlawfully levied because FKP is the holder of the trademarks and its own separate assets do not provide any recovery for claims against the Russian Federation. HVY contest this and further argue that FKP's reliance on the separate legal identities of FKP and the Russian Federation constitutes an abuse of rights.

4.10. FKP argues that it has been the full holder of the trademarks (at least) since the 2015 agreement. This Court disregards the dispute about the 2015 agreement and assumes the situation in which FKP has the trademarks under operational management. With regard to the position of FKP and its relationship with the Russian Federation in the situation of operational management, the parties agree on the following, which is also confirmed by the opinions presented and the relevant provisions of the RCC, the Law on UEs[15] and the charter of FKP charter (2019) mentioned in the footnotes:

4.10.1 FKP is a legal entity within the meaning of Article 48 RCC, with its own separate capital. This means that FKP is liable for its obligations with that capital and is also

[13] Dutch Civil Code.
[14] Dutch Code of Civil Procedure
[15] The Russian 2002 Federal Law on State and Municipal Unitary Enterprises and abbreviated to "the Law on UEs".

entitled to acquire and exercise rights, enter into obligations and take legal action in its own name.

4.10.2 FKP is a Russian state enterprise (*Federal State Unitary Enterprise* (FSUE)), more specifically a so-called *Federal Treasury Enterprise* (FTE). This legal entity under Russian law has its origins in the Soviet tradition of state ownership. There are thousands of FTEs in the Russian Federation.

4.10.3 Article 113 RCC defines an FSUE and determines - where relevant:

"1. The unitary enterprise is a commercial organisation having no right of ownership in respect of the property that has been assigned thereto by the owner. (...)

2. The property of a state or municipal unitary enterprise is under state or municipal ownership and it belongs to such enterprise by the right of economic jurisdiction or operative management.

The rights of a unitary enterprise in respect of the property assigned thereto shall be defined in accordance with the present Code and a law on state and municipal unitary enterprises. ”

4.10.4 The legal status of an FTE is determined by the RCC, the Law on UEs and the charter. FTEs are charged with the operational management of Russian state-owned property allocated to them. Now that an FTE is a species of the FSUE, both the provisions for FSUEs and the specific provisions for FTEs apply to FTEs.

4.10.5 An FTE is stablished, reorganised and liquidated by the Russian Federation.[16] An FTE may only dispose of and transfer state property allocated to it with the consent of the Russian Federation.[17] The Russian Federation may repossess allocated state property from an FTE if the assets are redundant, unused or misused.[18]

4.10.6 The (amendments to the) charter of an FSUE requires the approval of the Russian Federation.[19] The Russian Federation appoints and dismisses the director of an FSUE,[20] who is accountable to the Russian Federation.[21] The appointment and dismissal of the chief auditor of an FSUE are regulated by the Russian Federation.[22] The employment contract with the director of FKP is concluded by the state body supervising FKP.[23]

4.10.7 The activities of an FSUE must be in line with its objects clause and the budget approved by the Russian Federation.[24] The activities of a FSUE are supervised by the

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[16] Article 8 Law on UEs and Article 20(1)(5) Law on UEs, Article 35 UE Act. Court note: The legal provisions referred to always refer to "*the owner*", that may be the Russian Federation or any other Russian public body'. For the sake of readability and because in relation to FKP it concerns the Russian Federation, reference is here made to 'the Russian Federation'.
[17] Article 297(1) RCC. This also applies to an FGEU. See Article 19 (1).
[18] Article 296(2) RCC.
[19] Article 20(1)(4) Law on UEs.
[20] Article 20(1)(7) Law on UEs.
[21] Article 21(1) Law on UEs.
[22] Article 20(1)(8) Law on UEs.
[23] Article 27 Charter FKP (2019).
[24] Article 19(2) Law on UEs.

Russian Federation.[25] The Russian Federation defines the objectives of an FSUE and assesses whether or not they are met.[26] The Russian Federation may initiate avoidance proceedings with third party effect with regard to legal acts of the FSUE and claim damages.[27] The Russian Federation may also conduct procedures to protect the state ownership that an FTE has in operational management.[28]

4.10.8 An FSUE transfers profits to the Russian Federation, which determines how the revenues of the FSUE are used.[29] The fruits of the operational management of allocated state property accrue to the Russian Federation.[30] An FTE cannot go bankrupt.[31]

4.10.9 Under Russian law, creditors of the Russian Federation cannot recover against assets of an FTE. This follows from Articles 113(6) and 126(1) RCC, which - where relevant - read as follows:

Article 113 (6) RCC: *For its obligations the unitary enterprise is liable with all the property it has. The unitary enterprise is not liable for the obligations of the owner of its property. (...)* Article 126(1) RCC: *The Russian Federation, (...) shall be answerable by their obligations with the property they possess by the right of ownership, with the exception of the property that has been assigned to the legal entities, which they have set up by the right of economic or of operative management, and also of the property that shall be placed only in the state (...).*

4.11. The figure under Russian law of operational management gives FKP the exclusive right to use and exploit the trademarks, to register them in its own name and to enforce them in law in its own name.[32] The content of the operational management is also described in the preamble to the 2015 agreement as:

'the right to use and dispose of the trademarks of alcohol and alcohol-containing products abroad, register those trademarks in its own name and bring suit to claim back those trademarks, cease infringements on those trademarks, recover for suffered damages and any other claims related to the trademarks

HVY stress that the legal and statutory objective of FKP, as an FTE, is to carry out operational management of state property allocated to it and HVY argue that FTEs such as FKP are in fact fully controlled by the Russian Federation. According to HVY, in the words of their expert, FKP therefore has "*limited legal capacity*". Even if that were the case - which FKP contests with reasons and can remain undiscussed here - that does not alter the fact that, in the assumed situation of operational management, FKP is entitled - if necessary - to register the trademarks in its own name and to exercise the exclusive rights of use, exploitation and enforcement attached to the trademarks.

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[25] Article 20(1)(11) Law on UEs.
[26] Article 20(1)(2) and (12) Law on UEs.
[27] Article 21(3) Law on UEs.
[28] Article 21(4) Law on UEs.
[29] Article 17 Law on UEs and Articles 295 (1) and 297 (2) RCC.
[30] Article 299 (2) RCC.
[31] Article 65 RCC.
[32] See also the ruling of the Court of Appeal in the Rotterdam proceedings.

property law aspects of the trademarks are governed by Dutch law.

4.12 The parties correctly assume that the property law aspects of the trademarks - including the question as to in whose assets the trademarks are invested - is governed by Dutch law. For the Benelux trademarks this follows from Article 4.8bis BCIP[33]. Paragraph 1 of this article provides that a Benelux trademark as an asset is in its entirety and for the entire Benelux territory governed by the internal law of the Benelux country in which, according to the register, the trademark is registered:

a. the holder had his domicile or principal place of business on the date of application for registration;

b. if point a. does not apply, the holder had an establishment on the date of the application for registration.

Paragraph 1 of Article 4.8bis BCIP does not apply, as VO/VVO and FKP did not have their domicile or registered office in a Benelux country on the date of the application for registration. It follows from paragraph 2 of Article 4.8bis BCIP - which provides that Dutch law applies if paragraph 1 does not apply - that Dutch law applies to the property law aspects of the trademarks. This was also the case prior to the introduction of Article 4.8bis BCIP.[34] The property law aspects of international trademarks valid in the Benelux are also governed by Dutch law, now that under Dutch private international law the law of the country for the territory for which the protection of the trademark is invoked is the Benelux.

4.13. The trademarks are transferable. They are therefore property within the meaning of Article 3:1 DCC, more specifically property rights within the meaning of Article 3:6 DCC. The trademarks are not goods. Under Dutch law - which only recognises ownership of goods - the trademarks are not subject to ownership rights. Like ownership, the right to a trademark is a full right. The trademarks are vested in the assets of the holder thereof.

The person in whose name the trademark is registered in the trademark register will generally be regarded as the owner of the trademark. FKP therefore has to be regarded as the holder of the trademarks. As holder of the trademarks, FKP is presumed to be the owner of those trademarks pursuant to Article 3:119(1) DCC. It may be required of HVY to invalidate this presumption, but it has failed to do so. Under the operational management taken as a starting point by HVY for attachment, FKP full and unreservedly has all rights of the holder of the trademarks. FKP also exercises these rights independently and in its own name. The fruits of the exploitation of the trademarks belong to the Russian Federation. However, this does not alter the fact that FKP is the holder of the trademarks and that the trademarks are vested in FKP's assets under Dutch law. This is in line with the considerations of the Court of Appeal in the Rotterdam proceedings which HVY took as a starting point, in which it was established that FKP maintained its own rights (as trademark owner).

4.14. The Court of Appeal found in the Rotterdam proceedings that FKP - as a state enterprise - was also acting on behalf of the Russian Federation. That is not to say that the trademarks under Dutch law are part of the recoverable assets of the Russian Federation. It is only an expression of the fact that FKP, in enforcing its trademark rights and litigating against Spirits,

[33] Benelux Convention on Intellectual Property (trademarks and designs).
[34] Cf. Hague Court of Appeal 24 July 2012, ECLI:GHSHR:2012:BX1515 grounds 81. to 8.9.

is also acting in the interest of the Russian Federation, to which it passes the fruits of the exploitation of the trademarks. The same applies to the consideration, cited by HVY, of this Court in its judgment of 17 May 2017[35] in the proceedings between FKP and Spirits on a number of national European trademarks, which entails that the Russian Federation must be considered to be bound by the outcome of those proceedings, since FKP, as a state enterprise, also represents the interests of the Russian Federation.

4.15. In so far as Russian law, which governs the legal form of FKP as an FTE and hence its relationship with the Russian Federation, could be relevant, the following applies. To the extent that Article 113(2) RCC, which provides that the assets of an FTE are "*under state ownership*" and "*belongs to such enterprise by the right of economic jurisdiction or operative management*" would in any way make the Russian Federation the (co-)holder of the assets of an FSUE or an FTE, this cannot lead to the FSUE/FTE's assets being used to recover claims against the Russian Federation. This is explicitly excluded in Articles 113(6) and 123(1) RCC. This was also held to be the case in the Dutch and French judgments cited by the FKP and the Russian Federation. Unlike in this case, in those cases Russian law was applied to the property law aspects of the property attached; for example, in the ruling of the Amsterdam Court of Appeal it concerned attachment of a ship registered in the Russian Federation, for which a different referral rule applies on the basis of Article 10:127(2) DCC than for trademarks.[36] Furthermore, the considerations in the French judgements about the 'bare ownership' of the Russian Federation on the matters at issue there, including ships, are not applicable to the attached trademarks, which under Dutch law are not goods on which a (bare) ownership right can rest. These comments do not detract from the relevance of these statements for this case.

4.16. Contrary to what HVY apparently assumed from their notification, it is plausible that HVY - in the assumed, situation of operational management - did not attach any recoverable assets of the Russian Federation. The ring-fenced assets of FKP do not provide recovery for claims on the Russian Federation.

4.17. The judgments of US and Australian courts[37], to which HVY refer, which - in summary - held that FKP had no '*standing*' in those proceedings and that FKP was used as 'cat's paw' by the real party, the Russian Federation, do not lead to a different opinion. This Court is not bound by those judgments as to the authority, under US and Australian law, of FKP to litigate on the US and Australian trademarks. These judgments on standing have no further bearing on whether or not, under Dutch law, the trademarks attached are recoverable assets of the Russian Federation.

4.18. It is not disputed that if the 2015 agreement is valid, which HVY dispute, claims against the Russian Federation since 2015 cannot be recovered against the trademarks. This Court notes here that the transfer was expressly made in the 2015 agreement to the extent necessary. Indeed, the 2015 agreement covers *'property to the extent such assigned property would not already lie with "Party 2"* [FKP, addition Court]. As considered above, the trademarks were

[35] The Hague District Court 17 May 2017, ECLI:NL:RBDHA:2017:5223, ground 4.40.
[36] Amsterdam Court of Appeal 18 August 2000, ECLI:NL:GHAMS:2000:AA6850.
[37] Judgments of the US District Court of New York of 1 September 2011 and the US Court of Appeals, Second Circuit, of 5 August 2013 in proceedings between Spirits and FKP, Docket no. 11-4109-CV. (GP36) and the judgment in the proceedings between Spirits and FKP et al., FCA 931, Federal Court of Australia, of 25 July 2006 (GP35), Permanent Stay in the Australian proceedings between FKP and Spirits [2019] FCA 802 (GP41).

already part of FKP's assets under the Dutch law applicable to them even before the conclusion of the 2015 agreement, against which claims on the Russian Federation cannot be recovered.

abuse of rights by FKP?

4.19. This Court now considers HVY's claim of abuse of rights by FKP by invoking its independent legal standing towards HVY in relation to the Russian Federation. It follows from Articles 10:118-119 DCC that this dispute is governed by Russian law, the law of the State under which FKP was established.

4,.0. Article 10 RCC, titled, *The Limits of Exercising Civil Rights,* reads as follows:

1. As not admissible shall be deemed the exercise of civil rights solely for the purpose of inflicting harm upon another person, actions in circumvention of the law for attaining an unlawful aim, as well as any other wittingly unfair exercise of civil rights (the abuse of rights). Seen as inadmissible shall be the use of civil rights for the purpose of restricting competition, as well as the abuse of a dominating position in the market.

2. In case of failure to satisfy the requirements stipulated in Item I of this Article, a court of law, arbitration court or arbitration tribunal shall reject a person's claim for the protection of the right held by such in full or in part, subject to the nature and consequences of the abuse made, and shall take other measures provided for by law.

3. Where an abuse of a right manifests itself in carrying out actions in circumvention of the law with an unlawful aim, the effects provided for by Item 2 of this article shall apply insofar as the other effects of such actions are not established by this Code.

4. If an abuse of a right has entailed a violation of another person's right, such person is entitled to claim for repair of the damage caused by it.

5. The fairness of participants in civil law relations and wisdom of their actions shall be presumed.

4.21. In view of the examples cited in the opinions and Russian case law submitted, Article 10 RCC can be applied in many situations. Kurzynsky-Singer points to an example in which Article 10 RCC has been applied to protect creditor interests:

an abuse of the right can be manifested in the alienation of property to prevent a possible levy of execution on that property."[38]

None of the examples, however, involved invoking the separate legal identity of an FTE, which was invoked for a claim by the Russian Federation. Furthermore, HVY's reliance on abuse of rights implies that Articles 113(6) and 126(1) RCC are denied effect. It is questionable whether these legal provisions can be set aside by invoking Article 10 RCC. According to HVY, this is possible because Article 113(6) RCC does not give an absolute right to FKP and this provision can be set aside if an abuse of rights is made by relying on it. This position is based on Kurzynsky-Singer's report, which argues that the doctrine of abuse of

[38] Russian Supreme Court 14 June 2016, no. 52-KG16-4 (Annex 31 to GP42), cited in par. 189 Kurzynsky-Singer report.

rights, as applied in Russian legal practice, allows recourse to Article 113(6) RCC within the limits of good faith and in accordance with the "*principle of equality of the participants of civil law relationships as basic principle of the Russian civil legislation*" laid down in Article 1 RCC and further elaborated in Article 124(1) RCC, which states that the Russian Federation shall enter into civil law relations on an equal footing with other participants in the legal system. On this basis, according to Kurzynsky-Singer, it is not possible to interpret Article 113(6) RCC in such a way that FKP enjoys immunity from execution in all circumstances for claims against the Russian Federation.

4.22. If it is assumed that this reasoning has been accepted under Russian law - which FKP contests, with reasons - it will not be presumed that an FTE is abusing rights by invoking Article 113(6) RCC (and/or the mirror provision Article 126(1) RCC) or that such an appeal constitutes an abuse of rights. In view of the wording of Article 10 RCC and the examples from Russian legal practice provided by the parties, the "bar for abuse" - just as under Dutch law - appears to be high. Therefore, if at all possible, a successful reliance on abuse of rights when invoking Articles 113(6) RCC and 126(1) RCC by an FTE will, for the time being, require more than a reference to the characteristics of such a legal entity and its actual effect in the situation that the Russian Federation does not satisfy a claim.

4.23. HVY emphatically do not invoke identification and stress that they do not argue that all FGUE's invoking their independent legal standing constitutes an abuse of rights. Central to HVY's argument is that the trademarks registered in the name of FKP de facto belong economically to the Russian Federation and that FKP, in the circumstances, has abused its rights by invoking its independent legal standing. HVY draw attention to the following circumstances:

(a) FKP and its purpose are equal, or at least completely subordinate, to that of the Russian Federation, since FKP acts exclusively as manager of state property and does not perform any independent or autonomous function outside this function.
(b) The Russian Federation has decisive influence, control and say over FKP and the IP Rights assigned to it, whether the IP Rights are held by FKP in 'operational management' or in 'ownership'.
(c) The sole director of FKP is appointed, dismissed and supervised by the Russian Federation and his employment contract is also concluded with the Russian Federation and not with FKP.
(d) FKP and the Russian Federation have taken the position in proceedings and state publications - including after the 2015 agreement - that the Russian Federation is the owner of the IP Rights.
(e) FKP acts materially in any case as a means to keep substantial assets of the Russian Federation out of the reach of creditors.

4.24. Again, this Court assumes, if necessary, the situation of operational management taken as a starting point by HVY. The circumstances referred to under (a) to (c) are equivalent to the characteristics of FKP as an FTE as set out in the RCC, the Law on UEs and the charter. Circumstance (e) is its effect in the situation that the Russian Federation fails to pay a claim. These characteristics apply to all FGUEs and FTEs and their effect in the situation that the Russian Federation fails to pay a claim occurs in all these state enterprises. As considered above, if reliance on Article 113(6) RCC (and Article 126(1) RCC) could constitute an abuse of rights, more will be required to make reliance by an FTE on one of those provisions contrary to Article 10 RCC. This also applies in this case, where the FKP was not established for the

purpose of keeping assets out of reach of creditors of the Russian Federation. In circumstance (e), HVY point to categorical refusal of the Russian Federation to comply with the arbitral awards and state that the Russian Federation, using the system of state entities, tries to prevent creditors from recovering against purely commercially used state property. In the light of the above considerations on the application of Article 10 RCC in Russian legal practice, this Court considers it insufficiently plausible that this passes the hurdle of Article 10 RCC in relation to FKP's in principle admissible reliance on Article 113(6) RCC (and 126(1) RCC).

4.25. Circumstance (d) is, according to HVY, an unacceptable form of 'equivocation', where a party at one moment adopts a position that is in its favour but then, in other proceedings - when that position no longer suits it - takes a diametrically different position in order to avoid the negative consequences of that earlier position. For the time being, there is no evidence to suggest that, under Russian law, FKP's communications in foreign proceedings, which, moreover, were made against another party (Spirits), and the extract from FKP's annual report for 2018, published in 2019, which states that FKP is litigating "*to restore the rights of the Russian Federation to trademarks abroad*" against HVY could constitute an abuse of rights in the context of the execution of arbitral awards. In addition, FKP has referred to procedural documents from the other proceedings cited by HVY, in which it is stated that FKP - contrary to HVY's assertions - have - since 2015, referring to the 2015 agreement (to the extent necessary), relied on their position as full holder of the trademarks filed and held by VO/VVO and by itself. It also follows that FKP took that position after 2015 in the proceedings on the European trademarks which are now pending before this Court. Finally, the reference made by HVY to the website of the lawyers' office of FKP, where until recently it could be read that two of them assisted the Russian Federation, is not an expression attributable to FKP.

4.26. HVY's reliance on the 'Samruk case'[39] is of no avail to them, on the ground alone that said case involved an abuse of rights under Kazakhstan law. Even if the facts and circumstances of that case were similar to those of the present case - which need not be discussed here - it cannot automatically be assumed that what was identified in the 'Samruk case' as an abuse of rights under Kazakhstan's law also constitutes an abuse of rights under Russian law.

4.27. Now that Russian law has to be applied to the alleged abuse of rights, it is irrelevant whether, in the given circumstances, this is (also) the case under Dutch law, as stated by HVY, and what HVY put forward about arbitral awards against states being made toothless if state property is protected against recovery by creditors, can also remain undiscussed.

Conclusion on the principal claim and weighing of interests

4.28. It follows from the above that there is an unlawful attachment of FKP's assets which cannot serve as an object of recovery against the Russian Federation. Furthermore, since HVY's reliance on abuse of rights is not valid, the attachment must be lifted. This Court will lift the attachment in accordance with the principal claim. In the absence of sufficient concreteness,

[39] Amsterdam District Court in preliminary relief proceedings 5 January 2019, ECL1:NL:RBAMS:2018:795, Amsterdam Court of Appeal 7 May 2019, ECLI:NL:GHAMS:2OI9:1566. The appeal in cassation is now pending before the Supreme Court. Opinion AG 26 June 2020, ECLI:NL:PHR:2020:650.

HVY's reasoned objection to the claimed provisional enforceability fails. This Court does not get round to discussing the other points of dispute or the alternative claim for suspension.

4.29. HVY, as the party ruled against, are ordered to pay the legal costs on the part of FKP, which costs are estimated at a total amount of €2,209.38 (i.e., €656 in court registry fees, €1,470 in lawyer's salary[40] and € 83.38 on account of the summons served on HVY).

4.30. There was no dispute between FKP and the Russian Federation about the lifting or suspension of the attachment. The Russian Federation is therefore not considered a party ruled against which should be ordered to pay the legal costs.

5. The decision

The Court in preliminary relief proceedings

5.1. lifts the attachment levied by HVY on the trademarks referred to under 2.3;

5.2. orders HVY to pay the costs of these proceedings on the part of FKP, to date estimated at €2,209.38;

5.3. declares this judgment provisionally enforceable,

5.4. dismisses all other applications.

This judgment was rendered by the Right Honourable Judge L. Alwin and pronounced in open court on 27 October 2020.

[Signature]

L. Alwin
[Signature]

[40] In accordance with the recommended rates published on www.rechtspraak.nl, in which a connection was sought with the category 'Handel-KG (contr) Complex'.